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NO. 91-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

MINAS H. PAPAS, et al.,

*Petitioners,*

vs.

THE UPJOHN COMPANY, and ZOECON CORPORATION,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Dana G. Bradford, II
(Counsel of Record)
Lee S. Haramis
BAUMER, BRADFORD, WALTERS
& LILES, P.A.
225 Water Street, Suite 2000
Jacksonville, Florida 32201
904/358-2222

Arthur H. Byrant
TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C.
1625 Massachusetts Ave., NW
Suite 100
Washington, D.C. 20036
202/797-8600

Attorneys for Petitioners

Drew Communications Group, Inc. • 1-800-368-7768

## QUESTIONS PRESENTED[1]

1. Did the court of appeals err in ruling that Congress intended the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et. seq.* ('FIFRA'), to impliedly preempt state common law damage claims for failure to warn and inadequate labeling?

2. Did the court of appeals err in ruling that Congress intended FIFRA to impliedly preempt such claims, even when the Environmental Protection Agency ('EPA') registered a product and approved its label on the basis of inaccurate information submitted by the manufacturer?

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[1] Petitioners, Minas H. Papas and Ollie M. Papas, his wife, appeared as Plaintiffs/Appellants below. Respondents The UpJohn Company and Zoecon Corporation appeared as Defendants/Appellees below. In addition, the following parties appeared as *amicus curiae* in the Court of Appeals: The State of Florida, Attorney General Robert A. Butterworth; Consumers Union of the United States, Inc.; National Coalition Against the Misuse of Pesticides; United Farm Workers of America; Farm Workers Justice Fund, Inc.; Comite DeApoyo A Los Trabajadores Agricolas; and Trial Lawyers for Public Justice, PC (all in support of Petitioners) and National Agricultural Chemicals Association; Chemical Manufacturers Association; Chemical Specialties Manufacturers Association; American Wood Preservers Institute; National Pest Control Association; Product Liability Advisory Counsel; Reichhold Chemicals, Inc; and The Dow Chemical Company (all in support of Respondent Zoecon).

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## OPINIONS BELOW

The opinion of the district court is unreported and appears in the appendix to this petition at Pet. App. 13-26. The opinion of the court of appeals is reported at 926 F.2d 1019 (11th Cir. 1991), and appears at Pet. App. 1-12.

## JURISDICTION

The judgment of the court of appeals was entered on February 28, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

## STATUTES AND REGULATIONS

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 et. seq. ('FIFRA'), provides in pertinent part as follows:

§ 136v. (1988) Authority of States

(a) In general

A State may regulate the sale or use of any federal registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continuein effect any requirements for labeling orpackaging in addition to or different from those required under this subchapter.[2]

* * * * *

§ 136(p) Label and labeling -

(1) Label. - The term "Label" means thewritten, printed, or graphic matter on, orattached to, the pesticide or device, or anyof its containers or wrappers.

(2) Labeling. - The term "Labeling" means all labels and other written, printed orgraphic matter -

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[2] § 136v(b) of FIFRA was amended, effective October 25, 1988. The only change to the language of this portion of the statute was to add the heading to § 136v(b) "Uniformity". The events that formed the factual basis for the Petitioners' claims in the underlying lawsuit all occurred prior to 1988.

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, States experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

## STATEMENT

This is a diversity action, filed pursuant to 28 U.S.C. §1332, seeking damages under Florida common law for severe personal injuries suffered by petitioner Minas H. Papas and derivative injuries suffered by his wife, Ollie M. Papas. From 1982 through 1986, Mr. Papas was employed by the Clay County Humane Society in Clay County, Florida. One of his duties was the administration of treatments for dermatological disorders found in dogs housed in the Humane Society's animal shelter. This required physically dipping the dogs in a bath containing one of two products - -Paramite, a product manufactured by respondent Zoecon, or Mitaban, an extremely similar product manufactured by Upjohn. Throughout the course of his employment, Mr. Papas was repeatedly and continuously drenched by these products, and inhaled their fumes.

In July of 1986, Mr. Papas began displaying symptoms of serious health disorders. He was ultimately hospitalized in late 1986, diagnosed as having aplastic-anemia/pancytopenia, a debilitating hematological disorder, and declared totally disabled. His condition and symptoms were consistent with a classic case of benzene poisoning. Once Mr. Papas was completely removed from his work environment and no longer administered the products, his condition improved to a limited degree (indicative of the causal relationship between exposure to the product and the disease), but he still suffers from irreparable damage to his hematological system and remains disabled.

Both Zoecon's and Upjohn's products contained, as approximately 70% of their makeup, an aromatic petroleum based hydrocarbon solvent as an inert ingredient. The solvent utilized in Zoecon's product (known as "Sure-Sol 190") typically consisted of 1/10 of 1% (0.10%) of benzene by weight. The solvent utilized in Upjohn's Mitaban product also contained benzene, in a somewhat smaller, but nevertheless measurable, amount. Benzene is a highly toxic substance which has been placed on the EPA's "list of inerts of toxicological concern."

While both Paramite and Mitaban were registered with the EPA and the Food and Drug Administration ('FDA'), and each bore a label approved by one of those agencies, neither product's label informed end users, such as Mr. Papas, that the product contained any benzene. Similarly, neither label included any

warning whatsoever of the potential for the development of diseases, such as aplastic anemia/pancytopenia, which could result from long term exposure.

Under EPA regulations promulgated pursuant to FIFRA, manufacturers seeking to register pesticides submit self-prepared test data to the EPA, which EPA then reviews, but does not actually test itself. *See*, 40 C.F.R. Part 158 (1988). Manufacturers also submit proposed labels for pesticides to the EPA, which can approve, disapprove, or suggest modifications to them, and manufacturers may apply to have the EPA approve changes in previously approved labels. *See*, 40 C.F.R. Part 156 (1988).

In this case, however, none of those regulatory procedures provided any protection to Mr. Papas and his wife. Amazingly, plaintiffs learned during discovery that neither Zoecon nor Upjohn informed either the EPA or the FDA of the presence or quantities of benzene contained in their products.[3]

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[3] Both Upjohn's and Zoecon's products have been registered with both the FDA, pursuant to the Federal, Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et. seq.* (the "FDCA"), and the EPA, under FIFRA. The base formulation of Zoecon's Paramite product had previously been registered as a pesticide under FIFRA prior to the amendment of the statute and creation of the EPA in 1972. When FIFRA was amended in 1972 it allowed for products previously registered, such as the base formulation of Paramite, to be re-registered by EPA with relatively little regulatory review of the product and its labels. That is what happened with Paramite. The Paramite product was later also deemed to be a new animal drug, but, since its base formulation was already registered with the EPA, that agency, rather than the FDA, reviewed and approved the Paramite label. Upjohn's Mitaban product was initially proposed for approval in the late 1970's and was deemed at that time to be a new animal drug. Accordingly, the FDA approved the labels borne by that product. *See*, 7 U.S.C. § 136(u).

In February 1988, Mr. Papas and his wife commenced this action against Upjohn and Zoecon in the United States District Court for the Middle District of Florida, seeking damages from both companies in separate counts for negligence, strict liability, and breach of implied warranty of merchantability. Common to each count, in addition to other asserted bases for relief, was the charge that the labels failed to adequately warn of the products' dangers and of steps that should be taken to avoid them. The answers filed by both Zoecon and Upjohn raised as a defense that they had fully complied with all federal labeling requirements under FIFRA, thereby satisfying any duty to warn.

On April 10, 1989, Zoecon moved for partial summary judgment on the basis that section 136v(b) of FIFRA expressly preempts all of plaintiffs' claims to the extent that they allege inadequate warning or labeling.[4] In response, the Papases asserted that FIFRA neither expressly nor impliedly preempts state common law failure to warn claims, relying upon the holding in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C.

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[4] Upjohn did not join in Zoecon's motion for partial summary judgment, in part because its product's label was approved by the FDA, rather than the EPA, since its product was deemed by the agencies to be a new animal drug and not a pesticide. In light of case law which overwhelmingly holds there is no preemption of such claims by the FDCA, which contains a provision comparable to 7 U.S.C. § 136v(b), Upjohn recognized that to join in the motion would have been futile. *See, e.g. Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 n.1, 1113-14 (4th Cir. 1988).

Cir. 1884), *cert. denied,* 469 U.S. 1062 (1984). The *Ferebee* case was the only federal appellate decision in the country addressing the issue of FIFRA's preemptive effect on common law damage claims. It held that there was no preemption whatsoever.

The Papases also contended, relying on *Hurley v. Lederle Lab. Div. of American Cyanamid,* 863 F.2d 1173 (5th Cir. 1988) (which held that FDA approval of a proposed label has no preemptive effect if based on incomplete or inaccurate information), that the EPA's registration of Paramite and approval of its label could not preempt plaintiffs' claims because EPA's actions were based on incomplete and inaccurate information. Simply put, Congress could not have intended that EPA's approval of Paramite's label would immunize Zoecon from liability for failure to warn of benzene, when Zoecon had not even told the EPA that Paramite contained that highly dangerous chemical.

On August 2, 1989, the district court granted Zoecon's motion and entered judgment for Zoecon and against the Papases to the extent that the Papases' claims were based on failure to warn, finding that FIFRA expressly preempted such claims. The district court recognized the controlling nature of this preemption ruling and certified its order for interlocutory appeal under 28 U.S.C. § 1292 (b).[5] Zoecon agreed with the Papases' applica-

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[5] The district court stayed the proceedings pending the disposition of an interlocutory appeal.

tion and in fact asked the Eleventh Circuit to hear the interlocutory appeal, which it did. *See, Papas v. Upjohn Co.*, Pet. App. 2.

On February 28, 1991, the court of appeals issued its decision, *per curiam*, holding that FIFRA impliedly preempts the Papases' claims to the extent they are based upon inadequate warning and labeling. The decision did not explicitly mention basic legal principles of the presumption against preemption or basic legal principles of preemption analysis (particularly implied preemption analysis), but the court's ruling turned on the presumption's presence and (in the court's view) its absence.

The court first reviewed FIFRA's statutory language and regulations promulgated by EPA under FIFRA, and, undoubtedly, due in part to the presumption against preemption, declined to find that plaintiffs' common law claims were expressly preempted. "[M]indful that 'Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires'," the court said, quoting its earlier decision in *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3628, 110 S.Ct. 1781 (1990), "we admit to a little uncertainty and pass over the question of express preemption.' *Papas*, Pet. App. 7.

The court's implied preemption analysis, however, was not affected by the presumption against preemption, however, because, in the Eleventh Circuit's view, the presumption

simply does not apply to an implied preemption analysis. It recently stated:

> [I]n contrast to the strong presumption against preemption that we apply in determining whether the language of a federal statute or regulation expressly preempts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights.

*Taylor, supra.*

In the case at bar, the Eleventh Circuit was guided by and ratified this view, noting:

> [I]n implied preemption analysis it is possible to infer preemptive intent solely from effects: even if statutory language or legislative history is unclear....

*Papas*, Pet. App. 4, *quoting Taylor, supra.*

With this starting point, the Eleventh Circuit concluded that FIFRA impliedly preempted state common law damage inadequate warning claims for essentially two reasons. First, in an unprecedented finding, it held that Congress had completely occupied the field of pesticide labels and warnings. Second, it found a conflict between state law damage actions and compliance with FIFRA because the court believed that permitting state damage actions to proceed would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." Pet. App. 9. Although the court acknowledged that its holding directly conflicted with *Ferebee*, it neither

distinguished *Ferebee* nor gave any meaningful explanation as to why it disagreed with the *Ferebee* court's analysis and conclusions. Pet. App. 1, 10.

The court also rejected the Papases' contention that there could be no preemption where, as here, the EPA had approved the proposed labels and warnings based upon inaccurate and incomplete information provided by the manufacturer. Under FIFRA, the court said, it was up to the EPA to decide whether the label was inadequate or based on inaccurate information and, if so, whether the label should be changed. It did not explain why Congress would have wanted to give preemptive effect to labels approved on the basis of inaccurate information.

## REASONS FOR GRANTING THE WRIT

The federal government has been regulating pesticide labeling for over forty years. In 1947, Congress enacted FIFRA as "primarily a licensing and labeling statute"; the legislation "contained general standards setting forth the types of information necessary for proper labeling of a registered pesticide, including instruction for use; warnings to prevent harm to people, animals, and plants; and claims made about the efficacy of the product." *Ruckelshaus v. Monstanto Co.*, 467 U.S. 986, 991 (1983). Twenty-five years later, in 1972, "[b]ecause of mounting public concerns about the safety of pesticides and their effect on the environ-

ment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest," Congress expanded FIFRA's scope, transforming it "from a labeling law into a comprehensive regulatory statute." *Id.* Neither version of FIFRA, however, said anything about compensating pesticide poisoning victims or displacing the traditional role of the states in providing for such compensation.

Throughout this time period, consumers injured by inadequately labeled pesticides sought and obtained compensation through state common law tort actions. As in other product liability cases, manufacturers routinely argued that compliance with federal standards precluded a finding of liability and, again as in other such cases, the states routinely rejected that argument - - holding that compliance constituted strong, but not conclusive, evidence that the manufacturers gave an adequate warning for purposes of state common law.

In the early 1980's, the manufacturers, taking another tack, even argued that EPA approval of pesticide labels under FIFRA preempted state common law based warning claims. This argument, however, was seemingly put to rest by the unanimous decision of The United States Court of Appeals for the District of Columbia Circuit in *Ferebee, supra*. The *Ferebee* court rejected the preemption argument in its entirety, holding that Congress

had no intent whatsoever to preempt state common law based warning claims relating to pesticides.

Thus, for virtually the entire past forty years, a judicial state of affairs has existed whereby compliance with FIFRA, like compliance with other federal consumer protection statutes, did not wholly immunize manufacturers from liability under state common law. *See, e.g., Wells v. Ortho-Pharmaceutical Corp.*, 788 F.2d 741 (11th Cir. 1986), *cert. denied* 479 U.S. 950 (1986) (in which the Eleventh Circuit quoted extensively from *Ferebee; United States v. Bass*, 404 U.S. 336 (1971).

A few years after *Ferebee*, manufacturers defending against inadequate warning claims in cases involving cigarettes began to successfully assert the defense that such claims were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et. seq.* (the 'Cigarette Act'). *See, Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 59 U.S.L.W. 3652, 111 S.Ct. 386 (1991). Consequently, pesticide manufacturers again began to claim that FIFRA's labeling provisions preempted state common law warning claims relative to pesticides, arguing that FIFRA was analogous to the Cigarette Act, and seeking to overturn the *Ferebee* decision. The first reported case where such an argument was given any judicial support was in *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

There are, it should be noted, significant differences between the Cigarette Act and FIFRA, which make the argument for FIFRA preemption of pesticide warning claims far less compelling than the argument for preemption asserted in the cigarette cases. As the First Circuit said in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 n. 13. (1st Cir. 1987):

> Under FIFRA, each manufacturer drafts a warning label for each product for EPA approval. Thus, two manufacturers of the same regulated product may use different labels of their own choosing, provided only that they obtain prior EPA approval. Further, [FIFRA] permits "states to impose more stringent constraints on the use of EPA-approved pesticides than those imposed by the EPA," indicating that Congress was indifferent to regulation of these products through state tort law. In contrast, the [Cigarette Act] explicitly (i) applies to cigarettes only; (ii) mandates the precise language of the label; and (iii) prohibits any state from regulating any aspect of cigarette warnings.

Despite these differences, the pesticide manufacturers rely on the cigarette cases to contend that FIFRA both expressly and impliedly preempts failure to warn claims. The *Ferebee* court rejected both of these contentions and the Eleventh Circuit rejected the former. The Eleventh Circuit, however, is the first federal appellate court to find implied preemption by FIFRA. In so doing, it takes two extraordinary steps. First, the Eleventh Circuit bases its analysis on an unwarranted principle, that the presumption against preemption simply does not apply to im-

plied preemption. Second, it holds that pesticide warning claims are impliedly preempted even when the evidence shows that the EPA approved a pesticide's label based upon inaccurate and incomplete information submitted by the manufacturer.

This Court has long recognized that, where Congress has neither provided nor suggested a substitute method for traditional state common law damage claims for compensating injured victims, preemption of state tort law should not be found. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954). In the instant case, the Eleventh Circuit, with a single stroke of its pen, has rejected this long standing principle as well as the equally long standing principle that state common law is not preempted by Congressional enactment without a clear and unequivocal expression of Congress's intent to preempt. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Thus, under its rationale thousands of persons injured by defective and inadequately labeled pesticides, including the Papases, will no longer be able to seek redress for their injuries in the courts of the United States, or the various states, despite there being no clear congressional intent to eliminate such remedies.

This Court has granted review of the *Cipollone* decision regarding cigarette warning claim preemption. *See, Cipollone, supra.*

Here, it is even clearer that there is no preemption of plaintiffs' failure to warn claims. Given that there is a clear split of authority in the federal circuits and trial courts throughout the nation on the issue and in light of the important federal question presented by the instant case, this Court should also grant certiorari to review the Eleventh Circuit's ruling below. Alternatively, this Court should hold the instant petition for writ of certiorari in abeyance, pending resolution of *Cipollone*.

**1. The Decision Below Conflicts With The Only Other Federal Circuit Court of Appeals Decision On The Issue And There Is A Wide Split Of Authority In The Federal District Courts And The State Courts On The Issue.**

Prior to the decision below, the only federal circuit court decision on the preemptive effect of FIFRA on state common law warning claims was *Ferebee, supra,* in which the District of Columbia Circuit unequivocally held that FIFRA neither expressly nor impliedly preempted such claims. Other circuit courts, in cases not directly involving FIFRA, favorably noted the *Ferebee* decision. *See, e.g., Palmer, supra; Wells, supra.*

The Eleventh Circuit's opinion in the case at bar aknowledges that the decision is contrary to that reached in *Ferebee,* creating

a clear conflict in the federal circuits. Pet. App. 2. The opinion below also documents that there is a clear split of authority on the issue at the district and state court level. *See, Papas* Pet. App. 2.

In 1987, the first reported decision out of any federal court appeared which took exception with the holding in *Ferebee*. *Fitzgerald, supra*. In *Fitzgerald* the court, relying on *Cipollone, supra*, held that pesticide warning claims are expressly preempted by FIFRA. Since that time, federal district courts have sharply divided on the issue of FIFRA's preemptive effect on state common law warning claims, as the Eleventh Circuit noted in its decision.[6]

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[6] For example, federal district court cases holding that there is no preemption of such claims under FIFRA include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474 (D. Colo. 1990) (interlocutory appeal pending); *Evenson v. Osmose Wood Preserving, Inc. & American Wood Preserves Inst.*, 1990 WL 285756 (S.D. Ind. 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D. La. 1990); *Kerns v. Dow Chemical Co.*, C.V. No. 89-649-PA (D. Oregon 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Whitner v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Wilson v. Chevron Chem. Co.*, 1986 WL 2412 (S.D.N.Y. 1986). The Eleventh Circuit also noted federal district court cases finding preemption of some type to include: *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556 (E.D. Mo. 1990); *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799 (M.D. Fla. 1989) (decided by the same district judge who decided the instant case); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989); *Herr v. Carolina Log Bldgs., Inc.*, No. EV 85-262-1283 (S.D. Ind. Sept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D. Md. Nov. 8, 1988).

The situation in the state courts is equally confused. Several state court cases directly conflict on the issue of FIFRA preemption.[7]

Thus, a state of affairs exists whereby litigants in federal and state courts asserting common law claims relating to pesticide labeling and warnings, as well as defendants raising defenses to such claims, face a situation where it is wholly unpredictable as to whether the courts in their cases will find that their claims are preempted or will be permitted to proceed. This situation creates a strong incentive for forum shopping. It is also manifestly unjust, as certain injured parties will obtain recoveries, while others will not, and certain defendants will not be held liable, while others will, solely because of the particular forum in which their cases are pending.

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[7] State court cases finding no preemption of common law warning claims by FIFRA include *Perry v. Dow Chemical Co.*, (Cir. Ct. 15th Judicial Circuit, Palm Beach County, Fla., Case No. CL 88 10227 AN, June 30, 1989); *Packowski v. Orkin Exterminating Co.*, Case No. 85-46671-NI (Cir. Ct. Kent County, Michigan, May 5, 1989); *Privette v. Armour Exterminating*, (Cir. Ct. of the 15th Judicial Circuit, Palm Beach County, Fla., Case No. 85-6279-CA, February 26 and March 16, 1988). State court cases finding preemption include *Begley v. Truly Nolan Exterminating, Inc.*, 573 So.2d 1038 (Fla. 3d DCA 1991); *Tessman Seed and Chemical Co. v. State of Minnesota*, File No. C8-89-349 (Minn. D.C. 2nd Judicial District, July 9, 1990); *Merrill v. Dow Chemical Co.*, File No. PI88-2630 (D.C. 4th Judicial Circuit, State of Minnesota, County of Hennepin, May 1, 1990); *Dubois v. Ray's Feed Mill, Inc.*, File No. 8809140-NZ (Cir. Ct., Delta County, Mich., Jan. 26, 1990); *Lopez v. Chevron*, Case No. 89272 (Superior Ct., Venturi County, N.Y., Dec. 11, 1989); *Paul v. NCH Corp.*, Index No. 48262 (Sup. Ct., Niagara County, N.Y., Dec. 11, 1989); *Rogers v. Thumb Pest Control of Florida Inc.*, Case No. 88-3462 (Cir. Ct. 13th Judicial Circuit of Fla., Oct. 10, 1989); *Wixson v. Sonford Products Corp.*, Case No. 24,847 (Chancery Ct., Rankin County, Miss., May 1, 1989); *Bolduc v. Chemed*, Case No. 43-94-55 (Superior Ct., Orange County, Cal., April 10, 1989), *aff'd on other grounds*, (No. G00838, Ct. of Appeals 4th Appellate District, Cal., September 24, 1990); *Selvig v. Lentz Fertilizer, Inc.*, File No. 85CV456 (Cir. Ct., Dunn County, Wis., Dec. 26, 1988).

Given the diversity of judicial opinions on FIFRA's preemptive effect, this Court should intervene to finally decide the question and lend certainty to judicial proceedings throughout the nation. The district court and the Eleventh Circuit in the instant case recognized the same by virtue of the 28 U.S.C. § 1292(b) certification (joined in by Zoecon) and its acceptance. Accordingly, the issue is ripe for determination by this Court and ought to be decided.

**2. The Preemption Analysis Conducted In The Decision Below Conflicts With The Analytical Framework For Preemption Analysis Established By Earlier Supreme Court Opinions And Other Circuit Court Opinions.**

This Court has repeatedly made clear that preemption analysis begins with the assumption and presumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725 (1981). Recognizing the critical federalism principles at stake, this Court has consistently admonished the lower courts that there is a strong presumption against preemption of any type, and that preemption should not be found absent a clear and unequivocal statement of Congress's intent to preempt. *See, e.g., Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947); *Penn Dairies v. Milk Control Com.*, 318 U.S. 261 (1943). This is particularly true in areas traditionally governed by state and local law, such as the regulation of health and safety

matters, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), including the compensation of victims.[8]

This Court has also made it plain that the presumption against preemption is particularly strong in regard to state common law claims when a finding of preemption would leave injured victims without any remedy. *Silkwood, supra*; *United Construction Workers*, 347 U.S. at 663-64;. *Accord, Abbot by Abbot*, 844 F.2d at 1113. This Court has also repeatedly stated that the indirect regulatory pressure asserted by common law claims is far less intrusive on federal regulatory schemes than direct state regulation, and that Congress may quite reasonably preempt the latter, but leave the former intact. *English v. General Electric Co.*, 58 U.S.L.W. 4679, 110 S.Ct. 2270 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988); *Silkwood*, 464 U.S. at 256. Finally, this Court's decisions unequivocally establish that the presumption against preemption is equally applicable to express and implied preemption analysis. *See, e.g., Louisiana Public Service Comm'n. v. F.C.C.*, 476 U.S. 355 (1986); *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707 (1985).

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[8] Undoubtedly, there is an acute local interest in the instant matter, as evidenced by the appearance of the Attorney General of the State of Florida as *amicus curiae* in favor of the Petitioners in the proceedings below. This Court is also aware of the acute local interest in the regulation of pesticides, as it has accepted certiorari in the case of *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 750 (1991), to review the Supreme Court of Wisconsin's ruling that Wisconsin municipalities' regulation of pesticides is preempted by FIFRA.

Disregarding all of the above, the Eleventh Circuit based its preemption analysis on the erroneous principle set forth in its earlier decision in *Taylor,* 875 F.2d at 824, that the presumption against preemption does not apply in an implied preemption analysis and that, regardless of what Congress said, implied preemption can be found solely on the basis of effects. The court's decision to discard the presumption against preemption is, of course, directly contrary to well-established principles of federalism, this Court's precedents, and the holding of numerous other federal circuit courts. *See, e.g., Associated Industries of Massachusetts v. Snow,* 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. New York City,* 855 F. 2d 48 (2d Cir, 1988). It also makes no sense. If anything, courts should be more hesitant to find preemption of state law when they are inferring Congress's intent from its actions than when they are when interpreting its express words.

The Eleventh Circuit compounded this fundamental error by automatically equating the indirect regulatory pressure arguably created by plaintiffs' tort claims with the unquestionable interference with federal regulation created by direct, contradicting state regulations. In the Eleventh Circuit's view, plaintiffs' common law claims must be preempted because Congress preempted state regulations and plaintiffs' claims might have the same regulatory impact. Established preemption doctrine

recognizes the difference between tort law and regulatory law, however, and says that Congress does not automatically preempt the former when it preempts the latter, despite the latter's arguable regulatory impact. *See, e.g., English, supra; Goodyear Atomic Corp., supra; Silkwood, supra.*

### 3. Whether Congress Intended FIFRA To Preempt State Common Law Of Inadequate Labeling Claims Is An Important Federal Question, Which Was Wrongly Decided Below.

The Eleventh Circuit's finding of implied preemption in this case is predicated on two basic conclusions. The first is that the federal government had completely occupied the entire field of pesticide labeling, leaving no room for state common law to augment FIFRA. The second is that jury awards of damages would directly conflict with federal law because state common law suits for inadequate labeling will stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

The conclusion that the federal government has occupied the entire field of pesticide labeling is a totally unprecedented and unwarranted finding. This Court has repeatedly found that federal regulations far more comprehensive than those at issue here do not occupy the entire field, much less preempt state common law claims for damages. *See, e.g., English, supra; Pacific Gas Electric Co. v. State Energy Resources Conservation &*

Development Comm., 461 U.S. 190 (1983); *Silkwood, supra.* Indeed, if the Eleventh Circuit's conclusion is correct, then pesticide manufacturers would even be immune from state criminal prosecution for fraud in connection with their warning labels, regardless of the outrageousness of their conduct, since federal law which has occupied the entire field, warranted it. *See, English,* 110 L.Ed. 2d at 80.

In determining that state common law suits for inadequate labeling would stand as an obstacle to FIFRA's purpose, the Eleventh Circuit failed to take notice of Congress's overriding intent in enacting the legislation. The essential purpose of FIFRA is to protect individuals and the environment from toxic effects associated with pesticide use and to prevent deceptive labeling. H.R. Rep. No. 939 100th Cong. 2d Sess. (1988) 26-27 *reprinted in* 1988, U.S. Cong. and Ad. News, 3475-3476. *See, also, National Agr. Chemicals Ass'n v. Rominger,* 500 F. Supp. 465 (E.D. Cal. 1980). The Eleventh Circuit's opinion improperly subordinates that purpose to Congress's desire for uniformity in labeling, but in fact, uniformity of labeling was not particularly important to Congress. Indeed, FIFRA noted, does not preclude manufacturers of identical products from using vastly different labels, as long as each submits its label to EPA for approval. The Eleventh Circuit also improperly equates a jury finding that a manufacturer must pay damages with an order that it must change its label. As a result, it imposes a rule under which

manufacturers escape liability even if their labels are woefully deficient, as long as the EPA approved them.

This rationale is completely at odds with the District of Columbia Circuit's recognition in *Ferebee* that pesticide manufacturers can, if they wish, continue to use their old labels (without seeking to change them pursuant to FIFRA) and pay damages for the resulting injuries. *See, also, Goodyear Atomic Corp.*, 486 U.S. at 185-186, dismissing the argument that preemption must be found if a manufacturer can comply with federal law and still be required to pay state law based damage awards. It also disregards the fact that, as *Ferebee* recognized, allowing state common law awards for inadequate labeling does not interfere with Congress' objectives in enacting FIFRA, but, rather, furthers Congress's paramount purpose of safety by piquing the interest of the EPA and giving manufacturers an incentive to formulate and propose more adequate labels and warnings.

The Eleventh Circuit's analysis similarly fails to acknowledge that Congress extensively amended FIFRA in 1988, after the *Ferebee* decision and with full knowledge of its holding, but did not alter FIFRA's provisions relating to labeling other than to add the heading "Uniformity". By so doing, Congress ratified and accepted the interpretation in *Ferebee*. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

Congress was also aware in 1988 of the EPA's inability to adequately deal with inert ingredients (the culprit in the instant

case) contained in pesticide formulations, its failure to conduct sufficient chronic toxicity testing of pesticides, and its general inability to adequately regulate the numerous pesticides marketed in the United States. *See*, United States General Accounting Office, Report to Congressional Requesters, Pesticides, EPA's Formidable Task To Assess And Regulate Their Risks (April 1986). In light of Congress's awareness of the *Ferebee* decision and the EPA's inability to adequately cope with the hazards posed by pesticides, as well as Congress's failure in 1988 to make clear an intent to preempt state common law tort claims, one can only conclud that Congress simply did not intend that warning claims be preempted.

The Eleventh Circuit's ruling effectively means that, in many cases, persons injured by pesticides will have no remedy whatsoever. There is no private remedy under FIFRA. *Nader v. U.S. E.P.A.*, 859 F.2d 747 (9th Cir. 1988); *Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030 (9th Cir. 1985); *Fiedler v. Clark*, 714 F.2d 77 (9th Cir. 1983); *In Re: Agent Orange Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980). This radical shift from the traditional state and federal balance of powers -- and the elimination of remedies for pesticide poisoning victims -- can not be what Congress intended when it enacted FIFRA, which, of course is totally silent on the subject of the preemption of state common law remedies.

Indicative of the Supreme Court's admonishments against

implied preemption resulting in the eradication of state common law remedies is this Court's decision in *Silkwood*, which stated at 251:

> [I]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

Even the dissenting justices in *Silkwood*, who believed that Congress had intended to preempt punitive damage awards, refused to attribute to Congress an intent to preempt compensatory damage claims stating:

> [I]t is inconceivable that Congress intended to leave victims with no remedy at all....

*Id. at* 263 (Blackmun, J. dissenting).

The Eleventh Circuit's decision in the case at bar has resulted in such an inconceivable situation. It should not be allowed to stand.

**4. Whether Congress Intended FIFRA To Preempt State Common Law Inadequate Labeling Claims Where The EPA Has Registered A Product And Approved Its Label On The Basis Of False Or Inaccurate Information Is Also An Important Federal Question, Which Was Wrongly Decided Below.**

The plaintiff in this case, Minas Papas, is suffering from benzene poisoning. As the petitioners have noted, while the EPA did register Zoecon's product and approved the label, discovery

has revealed that the EPA was never informed that Zoecon's product contained benzene in extremely dangerous quantities. In *Hurley*, 863 F.2d at 1180, the Fifth Circuit, considering the preemptive effect of an FDA approved label, held that there is no preemption under the FDCA in such circumstances. It ruled that summary judgment must be denied where a factual issue remains as to whether the manufacturer provided the agency with all necessary and available information about the proposed product.

The Eleventh Circuit's decision below rejects the Fifth Circuit's rationale, holding that the question of whether the EPA was provided with complete and accurate information is simply a matter to be resolved between the EPA and the manufacturer. Pet. App. 12. This leaves an injured party with no compensation even in the extreme case in which a manufacturer purposely defrauded the EPA. A manufacturer could only be sanctioned by the EPA, and only in the event that the agency discovered such a state of affairs, which is often times only discovered through inquiries made in connection with civil tort litigation.

The Eleventh Circuit's decision also ignores the practical realities involved when manufacturers submit proposed labels to the EPA for approval. Marketing pressures are present whereby manufacturers will seek approval of labels containing the least ominous warnings, so as not to have consumers avoid

purchasing products which warn of potential dire consequences when used. This would particularly be the case if manufcturers are immunized from suit, as results from the Eleventh Circuit's ruling. Thus, the label borne by Zoecon's seemingly innocuous product warned neither of its benzene content nor the serious health disorders which could result from exposure.

In the instant case, the Eleventh Circuit's ruling creates a particularly anomalous result because, as we have noted, Zoecon's formulation was initially registered as a pesticide, and its label approved by the EPA, while Upjohn's product was determined to be a new animal drug, and its label was approved by the FDA. *See*, 7 U.S.C. § 136(u). Nevertheless, the products performed essentially the same function, i.e., dips for dogs to rid the dogs of fleas, lice, vermin and dermatological disorders. Thus, the regulatory determination as to whether products such as these are to be considered as a pesticide or a new animal drug itself determines whether a remedy exists for inadequate warnings, i.e., a claim for an inadequately labeled pesticide is preempted, whereas a claim relating to new animal drug regulated by FDA is not necessarily preempted. Surely, Congress could not have intended the decision as to whether the EPA or the FDA approves the label to be dispositive.

For the Eleventh Circuit to find common law warning claims are preempted by FIFRA, while a vast body of case law holds that such claims are not preempted by the FDCA given the

similarity of the acts, is completely illogical. To find FIFRA preemption one must determine, as the Eleventh Circuit did, that Congress designated the EPA as being omniscient on the subject of pesticide safety and the *sine qua non* on the subject. However, since there is no FDCA preemption, it must be assumed that Congress did not consider the FDA to have similar expertise in the area of food, drugs and cosmetics, products which come into even more direct contact with human beings than pesticides. As the court noted in *Ferebee*, unless FIFRA can be viewed as an affirmative subsidization of the pesticide industry which commands states to accept EPA approved pesticides and their labels, it cannot be reasoned that FIFRA preempts common law warning claims. Moreover, from the facts in this case, which establish that EPA was uninformed about Paramite's benzene content, it is easy to see that EPA's approval of labels is not the last word in product safety.

Indicative of the incongruous reasoning conducted by the Eleventh Circuit is that court's apparent agreement with the holding in *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989). In *Jorling*, the Second Circuit held that additional written warning requirements imposed by New York state law were permitted by FIFRA's use regulation provisions, despite FIFRA's express prohibition of direct state regulation of labeling. While petitioners have no quarrel with that ruling, it is astounding that the Eleventh Circuit cites it with approval.

The New York regulations at issue in *Jorling* required written warnings to be posted at the location of the application of the pesticide. FIFRA defines labeling as "all labels and other written, printed or graphic matter accompanying the pesticide . . . at any time", 7 U.S.C. § 136(p). How such arguably direct state regulation of labeling and warnings could not be found to run afoul of FIFRA's provisions, while the Papases' common law claims for damages for inadequate warning can be said to violate Congress's intent in creating those provisions is a result which cannot be explained.

Such illogic permeates the decision below, which leaves injured parties without remedies and gives no incentive for manufacturers to formulate safe products and adequate labels, despite there being no evidence whatsoever that this was Congress' intent when it enacted FIFRA. Congress was well aware of its power to preempt and the means by which to accomplish such preemption. It simply did not preempt state common law failure to warn claims relating to pesticides.

## CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should hold the instant petition in abeyance, pending the resolution of *Cipollone*.

Respectfully submitted,

Dana G. Bradford, II
(Counsel of Record)
Lee S. Haramis
BAUMER, BRADFORD, WALTERS
& LILES, P.A.
225 Water Street, Suite 2000
Jacksonville, Florida 32201
904/358-2222

Arthur H. Byrant
TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C.
1625 Massachusetts Ave., NW
Suite 100
Washington, D.C. 20036
202/797-8600

Attorneys for Petitioners

May 27, 1991

# APPENDIX

**Minas H. PAPAS, Ollie M. Papas, his wife, Plaintiffs–Appellants**

**v.**

**The UPJOHN COMPANY, a Delaware corporation qualified to do business in the state of Florida, Zoecon Corporation, a Delaware corporation currently doing business in the State of Florida, Defendants-Appellees.**

**No. 89-3752.**

United States Court of Appeals,
Eleventh Circuit.

Feb. 28, 1991.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

Minas and Ollie Papas ("Papas") filed a diversity action in federal district court against the Upjohn Company and Zoecon Corporation. The complaint alleged that Minas, while working for a humane society had applied certain pesticides manufactured by Upjohn and Zoecon to dogs to rid the dogs of fleas, ticks, and other pests. The complaint also alleged that these chemical products caused him to suffer health problems. The complaint sounded in negligence, strict liability, and breach of implied warranty of merchantability, and included a derivative claim for loss of consortium. The three main counts were, in whole or in part, claims of inadequate labeling in the light of alleged dangers arising from exposure to the pesticides.

Zoecon moved for partial summary judgment on the labeling claims. It argued that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y ("FIFRA"), under which its product is registered, preempted such claims. The district court agreed and granted Zoecon's motion. Having determined

that this issue involves a controlling question of law on which there are substantial grounds for difference of opinion[1] and that an immediate appeal would materially advance the ultimate determination of the litigation, the district court certified the matter for interlocutory appeal, pursuant to 28 U.S.C.A. § 1292(b). We granted the petition to appeal, and the appeal followed. We conclude that state common law tort claims for inadequate labeling are impliedly preempted by FIFRA and, accordingly, affirm the district court's grant of partial summary judgment.

## I. THE DOCTRINE OF FEDERAL PREEMPTION

Federal preemption of state law is based on the supremacy clause of the Constitution:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. VI, cl. 2. Preemption can be either express or implied; it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and

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[1] Only one federal appellate court has considered the issue: in *Ferebee v. Chevron Chemical Company* 736 F.2d 1529 (D.C.Cir.1984), the court concluded that FIFRA did not preempt state common law tort suits based on inadequate labeling. District courts are split on the issue. Cases finding preemption include *Hurt v. Dow Chem. Co.*, No. 90-0783-C(3) (E.D.Mo. Sept. 28, 1990); *Kennan v. Dow Chem. Co.*, 717 F.Supp. 799 (M.D.Fla. 1989); *Fisher v. Chevron Chem. Co.*, 716 F.Supp. 1283 (W.D.Mo. 1989); *Herr v. Carolina Log Bldgs., Inc.*, No. EV 85-262-C (S.D.Ind. Dept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D.Md. Nov. 8, 1988); and *Fitzgerald v. Mallinckrodt, Inc*, 681 F.Supp. 404 (E.D.Mich. 1987). Cases in which district courts found no preemption include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F.Supp. 1474 (D.Colo. 1990); *Evenson v. Osmose Wood Preserving, Inc. & American Wood Preservers Inst.*, No. IP 87-383-C (S.D.Ind. Sept. 18, 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D.La. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F.Supp. 85 (E.D.Pa. 1989); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D.Ill. 1989); *Roberts v. Dow Chem. Co.*, 702 F.Supp. 195 (N.D.Ill. 1988); and *Wilson v. Chevron Chem. Co.*, 1986 WL 14925 (S.D.N.Y. 1986).

purpose." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).

> Preemption can be inferred
>
> (1) "when there is outright or actual conflict between federal and state law;"
>
> (2) "where compliance with both federal and state law is in effect physically impossible; "
>
> (3) "where there is implicit in federal law a barrier to state regulation;"
>
> (4) "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law;" or
>
> (5) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. "

*Louisiana Public Service Comm'n v. F. C. C.*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986) (citations omitted); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 491-92, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987); *Hillsborough County, Fla. v. Automated .Med. Labs.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *De La Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022; *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 825-26 (llth Cir.1989); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (llth Cir.1987). A state law - even if it has the same ultimate goal as a federal law - may, stand as an obstacle to the full implementation of a federal law and therefore be preempted "if it interferes with the methods by which the federal statute was designed to reach this goal" *Ouellette*, 479 U.S. at 494, 107 S.Ct. at 813.

The principle of implied preemption "applies whether the federal law is embodied in a statute or regulation, and whether the state law is rooted in a statute, regulation, or common law rule." *Taylor*, 875 F.2d at 826 (citations omitted). *Accord Ouellette*, 479 U.S. at 494-95, 499 n. 20 107 S.Ct. at 813, 815 n. 20 (state nuisance suits preempted by Clean Water Act); *Louisiana Public Service Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1898-99 (federal

agency action may preempt state regulation); *Automated Med. Labs.*, 471 U.S. at 713, 105 S.Ct. at 2375 (federal regulations can preempt state law); *Cipollone v. Ligget Group, Inc.*, 789 F.2d 181, 187 (3d Cir.1986) (state common law damage actions can have effect of imposing requirements which create obstacle to accomplishment of "full purposes and objectives of Congress") (decision and reasoning adopted by Eleventh Circuit in *Stephen v. American Brands, Inc.*, 825 F.2d at 313). Thus, we have recognized that the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor*, 875 F.2d at 824 n. 16 (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)).

The critical question in considering whether state law is preempted by federal law is Congressional intent –that is, "whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1899. "[I]n implied preemption analysis it is possible to infer preemptive intent solely from effects": even if statutory language or legislative history is unclear, federal law preempts state law if "the ordinary application of the two laws creates a conflict." *Taylor*, 875 F.2d at 826.

## II. THE FIFRA SCHEME Of PESTICIDE REGULATION AND LABELING

FIFRA, initially enacted in 1917, was completely revised in 1972, when the responsibility for its enforcement was transferred to the Environmental Protection Agency ("EPA") from the Department of Agriculture. The Senate Committee on Agriculture and Forestry, to which the bill was referred, identified two purposes of the 1972 revisions to FIFRA: to "(A) regulate the use of pesticides to protect man and his environment; and (B) extend Federal pesticide regulation to actions entirely within a single State." S.Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. At that time, FIFRA was amended to define "protect health and the environment" and "protection of health and the environment" as "protection against any unreasonable adverse effects on the environment." 7 U.S. C.A. § 136(x). "Unreasonable adverse effects on the environment" was, in turn, defined as "any unreasonable risk to man or the environment, taking into account

the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C.A. § 136(bb).

FIFRA's legislative history indicates that Congress intended to establish a comprehensive regulatory scheme in which the EPA Administrator would be responsible for determining whether to register a pesticide and, if so, under what circumstances. Congress recognized that the control of pesticides required a careful balancing of benefit against risk:

> While appropriate pesticides properly used are essential to man and his environment, many constitute poisons that are too dangerous to be used for any purpose. Others are dangerous unless used extremely carefully . . . Pesticides therefore have important environmental effects, both beneficial and deleterious. Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential.

S.Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted* in 1972 U.S. Code Cong. & Admin.News at 3996. The EPA administrator was designated as the entity to conduct the balancing analysis:

> The question [the Administrator] must decide is "Is it better for man and the environment to register this pesticide, or is it better that this pesticide be banned?" He must consider hazards to farmworkers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain when it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort and health of man. All these factors he must consider, giving each its due. No one should be given undue consideration, no one should be singled out for special mention, no one should be considered a "vital" criterion.
>
> For each pesticide the Administrator must ask the same question.... In each case the Administrator must take into account all relevant factors and decide whether it is better for man and the environment that this product be registered.

*Id.* at 4032-33. Under FIFRA, the Administrator is required to register a pesticide if he determines that, when considered with any restrictions imposed on it, the pesticide warrants the proposed

claims made for it; its labeling and other materials comply with FIFRA requirements; it will perform its intended purpose without unreasonable adverse effects on the environment; and when used in accordance with common practice, it will not generally cause unreasonable adverse effects on the environment. *See 7 U.S.C.A. § 136 a(c)(5).*

In this comprehensive regulatory scheme for pesticides, Congress delineated the extent to which the states could regulate pesticides in section 136v:

> § 136v. Authority of States
>
> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c) Additional Uses
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator....

7 U.S.C.A. § 136v (West 1980 & Supp.1990) (subsection headings added by 1988 amendment).

The statute's language, by itself, is a powerful limit on state power over labeling. A report accompanying the bill, as originally reported out of the House Committee, also indicated the limits on state power due to the division of authority between the federal and state governments: "In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee had adopted language which is intended to completely preempt State authority in regard

to labeling and packaging." H.R.Rep. 92-511, 92d Cong. 1st Sess. 16 (1971). Congress recognized that, while the intent of this provision was "to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act," subsection (b) preempted "any State labeling or packaging requirements differing from such requirements under the Act." S.Rep. 92-838, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News at 4021 (emphasis supplied); see also S.Rep. 92-970, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News 4092, 4128.

FIFRA directs that States "shall not impose or continue in effect any requirements for labeling or packaging" beyond the requirements imposed by FIFRA. Given FIFRA's words and its legislative history, FIFRA may expressly preempt state common law actions of the kind before us, just as FIFRA preempts other legal requirements in the form of state statutes and regulations. But, mindful that "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," *Taylor*, 875 F.2d at 824, we admit to a little uncertainty and pass over the question of express preemption. Instead, we will decide whether federal preemption of state common law tort claims based on labeling deficiencies can be inferred from FIFRA and the labeling regulations promulgated under it.

## III. STATE COMMON LAW TORT LABELING CLAIMS IMPLIEDLY PREEMPTED BY FIFRA

Under FIFRA, the federal government— through the EPA— has the sole and exclusive right to regulate pesticide labels. While states can regulate the sale or use of federally registered pesticides, no state can "impose or continue in effect any requirements for labeling or packaging [of pesticides] in addition to or different from" those required by FIFRA. 7 U.S.C.A. § 136v(b).

In 40 C.F.R. Part 156, the EPA has regulated almost every aspect of pesticide labeling. The EPA specifically regulates the manner in which warnings and precautionary statements for the pesticides are to be presented and provides specific requirements about the content, placement, type size, and prominence of the warnings and precautionary statements. *See* 40 C.F.R. § 156.10(h) (1990). These warnings and precautionary statements concern the toxicological hazards of the pesticide, including "hazard to

children, environmental hazard and physical and chemical hazard." *Id.* The EPA also requires that a statement of practical treatment (that is, first aid or other treatment) for each pesticide appear on the label. 40 C.F.R. § 156.10(h)(1)(iii). Additional warnings and precautionary statements about risks to humans are required under the heading "Precautionary Statements" and the subheading "Hazard to Humans and Domestic Animal."[2] Typical precautionary statements are prescribed which must be modified or expanded to reflect specific hazards." *See* 40 C.F.R. § 156.10(h)(2)(i)(B) and table.[3] In addition, the EPA requires that pesticide labels must contain directions for use stated in terms "which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide." 40 C.F.R. § 156.10(i)(1)(i). These directions, when followed, "must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment." *Id.*[4] It is in the light of these comprehensive regulations that the EPA approves a specific label for each pesticide.

We conclude that FIFRA impliedly preempts state common law tort actions based on labeling claims in several ways. First, having considered FIFRA's express prohibition of state labeling requirements in addition to those required under FIFRA, 7 U.S.C.A. § 136v(b), and having examined the labeling regulations adopted

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[2] The EPA requires that if a hazard exists to humans or domestic animals, these precautionary statements must indicate (1) "the particular hazard," (2) "the route(s) of exposure," and (3) "the precautions to be taken to avoid accident, injury or damage." 40 C.F.R. § 156.10(h)(2)(i)(A). The precautionary statements indicate whether protective equipment or garments are necessary when applying the pesticide.

[3] A pesticide is considered misbranded if "the label does not contain a warning or caution statement which may be necessary" and which if complied with, "is adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(G). A manufacturer is subject to penalties under FIFRA if its pesticide is misbranded.

[4] In addition, a pesticide is considered misbranded—and a manufacturer subject to various penalties, including registration revocation—if the labeling "does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with ... are adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(F). "The basic purpose of the statute [is] to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions." *Roberts v. Dow Chemical Co.* 702 F.Supp. 195, 196 (N.D. Ill.1988) (quoting *Continental Chemiste Corp. v. Ruckelshaus* 461 F.2d 331, 335 (7th Cir.1972)).

pursuant to FIFRA, see *supra*, we hold that the federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

We also hold that jury awards of damages in such tort actions would result in direct conflict with federal law. For EPA registered pesticides, the warning and use statements present on the labels indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *See* 7 U.S.C.A. §§ 136(q)(1)(F), 136(q)(1)(G), 136(bb); 40 C.F.R. §§ 156.10(h), 156.10(i). Thus, a jury determination, via a state common tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate to protect against health risks. Such a jury determination is also in direct conflict with the Congressional intent that *the* EPA *Administrator* determine the reasonableness of the risks to man and the environment posed by pesticides, at least with respect to the labeling of pesticides.[5]

In addition, allowing state common law tort suits for inadequate labeling would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." One of the EPA's objectives in its labeling regulations is the uniformity of labeling

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[5] The states are specifically permitted to make such determinations with respect to the "sale or use" of pesticides, as long as they do not permit any sale or use prohibited by the federal government under FIFRA. *See* 7 U.S.C.A. § 136v(a). *New York State Pesticide Coalition Inc. v. Jorling* 874 F.2d 115 (2d Cir.1989), is instructive about the respective authority of the state and federal governments to regulate pesticides under FIFRA. In *Jorling* the Second Circuit upheld certain state notification requirements placed on commercial pesticide applicators. It noted that "[t]he states have joint control with the federal government in regulating the use of pesticides, for the safety of its citizens and the environment . . . with the exception of the EPA's exclusive supervision of labeling." 874 F.2d at 118 (citation omitted). It drew a distinction between FIFRA labeling which "is designed to be read and followed by the end user," and notification requirements—regulation on pesticide use—placed on particular end users (professional pesticide applicators) which require them to provide certain information to those who contract to have pesticide applied, and to members of the public who may be exposed to the chemicals as a result of their application to public areas. *Id.* at 119.

across the nation and among (1) different brands of the same pesticide, (2) different pesticides performing the same function, and (3) different pesticides posing the same or similar risks to health and the environment. *See* 40 C.F.R. Part 156[6] This objective of achieving uniformity in labeling was endorsed by Congress: in 1988, without changing the language of § 136*v*(b) which prohibits state regulation of pesticide labeling and packaging, Congress added the heading "Uniformity" to this section. A jury determination that a label was inadequate would require that the manufacturer change the label or risk additional suits for damages. Such a change, if permitted by the EPA, would destroy the uniformity that Congresss and the EPA seeks to achieve in pesticide labeling because the warning label for that pesticide would not be based on the same criteria the EPA uses to establish warnings for all other pesticides.

It might be possible for a manufacturer to comply with both federal regulations and the requirements of state common law as dictated by state law damages awards against pesticide manufacturers, *see Ferebee*, 736 F.2d at 1541-42, but the pressure of such awards would interfere with the EPA's regulatory process because manufacturers would likely press the EPA to change its labeling requirements to reflect the jury awards so as to free the manufacturer from future tort liability for the same jury-found "inadequacies" in labeling. *See Kennan v. Dow Chem. Co.*, 717 F.Supp. 799, 806-07 (M.D.Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404, 107 (E.D.Mich.1987); *see also Palmer v. Liggett Group, Inc.* 825 F.2d 620, 627-28 (lst Cir.1987) (damages awards

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[6] This desire for uniformity is particularly evident in the regulation of pesticide warnings. Pesticides are grouped into four human toxicity categories based on selected hazard indicators, which include oral, inhalation, and dermal toxicity indicators and the effects of pesticide contact with eyes or skin. See table at 40 C.F.R. § 156.10(h)(1). The text of the warning on the front panel of the label is based on the pesticide's toxicity category. 40 C.F.R. § 156.10(h)(1). EPA regulations dictate which of four signal words can be used on the front panel of the label, depending on the toxicity category into which the pesticide falls—"Danger" and/or "Poison" for category I; "Warning" for category II; and "Caution" for categories III and IV. 40 C.F.R. §§ 156.10(h)(1)(i)(A)—156.10(h)(1)(i)(D). A pesticide manufacturer is *not* allowed to use "signal word(s) associated with a higher Toxicity Category" on its label, unless the EPA determines that "such labeling is necessary to prevent unreasonable adverse effects on man or the environment." 40 C.F.R. § 156.10(h)(1)(i)(E). In addition, a manufacturer cannot put more than one human hazard signal word on the front panel of the label. *Id.*

for inadequate labeling preempted by Federal Cigarette Labeling and Advertising Act). This case-by-case, state-by-state outside pressure on the regulatory process would hinder the development of an orderly, systematic, and uniform nationwide labeling scheme.

In this way, state common law tort suits based on labeling claims would also "stand as an obstacle to the accomplishment and execution of the full objectives of Congress" even if such suits led to "better" or "more adequate" labels, thereby serving FIFRA's goal of regulating pesticides "to protect man and his environment." A state law action which shares the same purpose as the federal law in question is preempted if it attempts to achieve that purpose by a method which interferes with the federal methods; as the Supreme Court said in *Ouellette,*

> it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

479 US. at 494, 107 S.Ct. at 813. For the labeling of pesticides, the EPA evaluates the toxicological data of any individual pesticide in comparison with the toxicological data for other pesticides, to achieve the protection of "man and his environment" through a labeling system that is uniform and consistent across the broad spectrum of pesticides. A jury's imposition of damages in a state tort suit premised on labeling claims would disrupt the methods by which FIFRA protects man and the environment because it would inject irrelevant considerations into the EPA's evaluation of a pesticide and its labeling and would second guess the EPA's conclusions.[7]

Allowing state common law tort actions based on labeling claims would permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose

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7. As the Supreme Court noted in the context of the Clean Air Act,

> [s]uch penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits.... If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability.... The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state concerns.

*Ouellette* 479 U.S. at 495, 107 S.Ct. at 813.

requirements for labeling pesticides. As we have stated before, the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor*, 875 F.2d at 824 n. 16. Considering our understanding of Congress's intent, we decline to permit such state regulation.

## IV. CONCLUSION

We hold that FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides to the extent that such actions are based on claims of inadequate labeling.[8]

The judgment of the district court is AFFIRMED.

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[8] Papas contends that even if we hold that FIFRA preempts state common law tort suits based on labeling claims, we should recognize an exception for instances in which, as Papas says exists here, a manufacturer has failed to provide the EPA with complete information on the pesticide. *See Hurley v. Lederle Labs. Div. of American Cyanamid Co.* 863 F.2d 1173, 1179-80 (5th Cir.1988). To the extent that *Hurley* purports to recognize an exception to federal preemption of common law tort labeling claims when the federal statute involved explicitly prohibits state regulation of labeling and the federal agency has received incomplete information from the manufacturer, we reject its holding at least as applied to FIFRA-regulated pesticides. Given the FIFRA regulatory scheme, it would be up to the EPA—and not a jury—to determine first (1) whether the information provided was incomplete or inaccurate; (2) whether the omitted information is significant enough to mandate a change in the label; and (3) how, if at all, the label should be corrected.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MINAS H. PAPAS and OLLIE M. PAPAS, his wife,

Plaintiffs,

vs. Case No. 86-116-Civ-J-14

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida, and ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Defendants.

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## ORDER AND PARTIAL SUMMARY JUDGMENT

### I. Defendant's Motion For Partial Summary Judgement

This case came on to be heard on Defendant Zoecon Corporation's Motion For Partial Summary Final Judgment, filed April 10, 1989; Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989; and plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989. The Court heard oral argument on May 26, 1989.

Defendant Zoecon argues that plaintiffs' claims for negligence, strict liability, and implied warranty are preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, [hereinafter "FIFRA"], to the extent that the claims are based on defendant's failure to warn about the dangers of Paramite. The Court shall review the legislative history of FIFRA and determine whether or not FIFRA preempts plaintiff's claims based on defendant's failure to warn.

#### A. Standard To Be Applied On Summary Judgment

A district court's review of a case on a motion for summary judgment is governed by Fed.R.Civ.P. 56. A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the district court that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Fed.R.Civ.P. 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. 477 U.S. at 325. When a moving party has so discharged its burden, the nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 324.

The district court must enter summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the

burden of proof at trial." 477 U.S. at 322; Fed.R.Civ.P. 56(c). *See also Reflectone, Inc. v. Farrand Optical Co., Inc.*, 862 F.2d 841, 843-4 (11th Cir. 1989). Whether or not the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, requires the court to draw inferences from the evidence as viewed in the light most favorable to the nonmoving party, and to resolve all reasonable doubts in that party's favor.

The Eleventh Circuit Court of Appeals explained the reasonableness standard in *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988):

> In deciding whether an inference is reasonable, the court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." . . . The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. . . . When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

842 F.2d at 1270 (citations omitted).

Fed.R.Civ.P. 56(c) requires the district court to deny a motion for summary judgment if the court finds that there exists a genuine issue for trial. What constitutes a "genuine issue for trial" was addressed by the Supreme Court in *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court stated that "summary Judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. The Court further stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-52.

The Court finds that the parties have had adequate time to conduct discovery in this case. The Court will, therefore, address the motion for partial summary judgment.

## B. Preemption Of State Tort Law By FIFRA

### 1. The Concept of Federal Preemption

The doctrine of preemption is based on Article VI, Clause 2 of the United States Constitution which provides:

> The Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding .

Preemption is deemed mandatory when Congress expresses a clear intent to preempt state law, where there is a conflict between state and federal law, where compliance with both state and federal law is impossible, where federal law implicitly bars state regulation, where Congress has legislated comprehensively, or where state law serves as an obstacle to federal objectives. *Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-69 (1986) *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). This Court has recognized that, in deciding whether a federal statute preempts state law, "the Court must ascertain Congressional intent in enacting the federal statute at issue." *Blue Cross and Blue Shield of Florida. Inc. v. Department of Banking and Finance*, 613 F. Supp. 188, 191 (M.D. Fla. 1985), *aff'd* 791 F.2d 1501 (11th Cir. 1986). An analysis of the legislative history and the specific provisions of FIFRA reveals that in enacting FIFRA Congress expressly intended to preempt state labeling requirements.

### 2. Legislative History of FIFRA

FIFRA represents the federal government's detailed comprehensive system for the strict regulation of pesticides. FIFRA was enacted in June, 1947, to replace and expand the protection afforded by the Insecticide Act of 1910, the first federal act regulating the pesticide industry. H.R. Rep. No. 313, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1200, 1201. The 1947 Act gave the United States Department of Agriculture authority over the regulation, registration and labeling of "economic poisons and devices."

In 1972, FIFRA was completely revised. Responsibility for enforcement of FIFRA was transferred from the Department of

Agriculture to the newly created Environmental Protection Agency [hereinafter "EPA"]. The two major goals of the 1972 revisions were to "regulate the use of pesticides to protect man and his environment" and to "extend Federal pesticide regulations to actions **entirely within a single State.**" S. Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993 (emphasis added). The intent to create a comprehensive regulatory statute is demonstrated by the President's environmental message included in the Senate report on the proposed 1972 Act. It noted, in pertinent part, that:

> Currently, Federal controls over pesticides consist of the regulation of the registration and labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act. The administrative processes contained in the law are inordinately cumbersome and time consuming, and there is no authority to deal with the actual use of pesticides. The labels approved under the Act specify uses to which pesticide may be put, but there is no way to insure that the label will be read or obeyed. The comprehensive strengthening of our pesticide control laws is needed.

S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4093-94.

Both the House and Senate bills explicitly detail the desire for federal preemption concerning labeling. The House bill provides:

> Section 23. AUTHORITY OF STATES
>
> Subsection (b) preempts any State labeling or packaging requirements differing from such requirements under the Act.

H.R. 10729, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4010, 4021 (emphasis added). Similarly, the Senate bill provides:

> Section 24. AUTHORITY OF STATES
>
> Subsection (b) **preempts any State or local government labeling or packaging requirements** differing from such requirements under the Act.

S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4128 (emphasis added). Therefore, it is clear that the express intent of Congress in enacting the 1972 revisions to FIFRA was to preempt state regulation of labeling requirements. The authority to promulgate such regulations was reserved exclusively for the EPA.

### 3. Preemption Of State law By FIFRA

FIFRA is explicit as to the preemption of state authority to regulate pesticide labeling. It specifically provides that:

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). The statutory language of FIFRA creates a prohibition of "any requirements for labeling" by states. Similarly FIFRA'S legislative history demonstrate a definitive congressional mandate that the regulation of pesticide labeling be controlled solely by the EPA.[1] It is clear that Congress has legislated comprehensively, barring the states from interfering with the regulation of pesticide labels .

### 4. Judicial Precedent in Support of FIFRA Preemption

FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald v. Mallinckrodt*, 681 F. Supp. 404 (E.D. Mich. 1987). In *Fitzgerald* plaintiff alleged personal injuries resulting from his exposure to defendant's chemical product, Calo-Clor, during the course of his

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[1] Pursuant to FIFRA, the EPA has enacted a series of regulations. Pursuant to 7 U.S.C. § 136a(c)(5)(C), the administrator of the EPA shall register a pesticide if he determines, *inter alia*, that it will perform its intended function without "unreasonably adverse effects" on man or the environment. A pesticide that is duly registered with the EPA must bear a label which contains EPA-approved warnings that the product is adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(G). Moreover, a label cannot contain language that is not approved by the EPA. 40 C.F.R. 162.10(a) Pursuant to the regulations promulgated under FIFRA, the EPA not only specifies the particular warning language required, *see* 40 C.F.R. § 162.10(a)(1), but also the type size, *see* 40 C.F.R. 162.10(a)(2)(ii)(A), color, *see* 40 C.F.R. 162.10(a)(2)(ii)(B), and placement, *see* 40 C.F.R. 162.10(a)(4), of the warning and all other specifications concerning labeling.

employment. Calo-Clor is an inorganic mercury-based fungicide which was registered with the EPA pursuant to FIFRA.

In granting summary judgment to the defendant on the basis of preemption, the Court recognized that in enacting FIFRA "Congress had **enacted a comprehensive system** for the registration and labeling of pesticides." 681 F. Supp. at 406 (emphasis added). The Court determined that "any state law tort recovery based on failure to warn theory, would abrogate the Congress' intent to provide uniform regulations governing the labeling of pesticides." *Id.* at 407.

In reaching its conclusion that state tort claims were preempted by FIFRA, the Court in *Fitzgerald* considered and rejected an earlier contrary holding in *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). Instead, the court relied on the recent holding in *Palmer v. Liggett Group. Inc.*, 825 F.2d 620 (1st Cir. 1987), *cert. denied*, 1989 U.S. LEXIS 338, where the First Circuit reasoned that a finding that a label is inadequate under a state tort theory,

> effectively compels the manufacturer to alter its warning to conform to different state law requirements as "promulgated" by a jury's findings . . . . This challenge to the federal warning label's sufficiency—surely contravenes the Act's policy of uniform labeling . . . . Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies.

*Fitzgerald*, 681 F. Supp. at 407, (*quoting Palmer v. Liggett Group. Inc.*, 825 F-2d at 627-28). *See also Cipollone v. Liggett Group. Inc.*, 789 F.2d 181 (3rd Cir. 1986) (finding the Federal Cigarette Labeling and Advertising Act preempts state tort claims based on alleged inadequacy of warnings).

The reasoning of *Fitzgerald* applies in this action. To permit additional labeling requirements to be imposed under state common law "would effectively authorize the state to do through the back door" that which was expressly preempted through the front. *Fitzgerald*, 681 F. Supp. at 407.

Plaintiffs' argument against preemption is primarily based upon *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.

1984), which held that FIFRA does not preempt state tort actions based on the inadequacy of an EPA-approved label. Central to the decision in *Ferebee* was the determination that a state court jury verdict does not automatically "require" a manufacturer to change its labels, but rather leaves to the manufacturer the "choice of how to react" to such jury verdict. *Id.* at 1542. ("Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.")

This Court must reject any argument holding that a state court jury verdict would merely leave to the manufacturer the "choice of how to react" to such jury verdict and would not automatically "require" a manufacturer to change its labels. As the First Circuit noted in *Palmer*:

> **This "choice of reaction" seems akin to the free choice of coming up for air after being underwater.** Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. **The most obvious change it can take, of course, is to change its label.**

*Palmer v. Liggett Group*, 825 F.2d at 627-28 (emphasis added).

This "choice of reaction" analysis was expressly considered and rejected in *Fitzgerald v. Mallinckrodt. Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987), in which it was held that FIFRA preempts state tort actions based on the inadequacy of an EPA-approved label. Most recently, the "choice of reaction" analysis has been rejected by the United States Supreme Court in *International Paper Company v. Ouellette*, 479 U.S. 481 (1987).

*Ouellette* involved an action against a paper mill located in New York State that discharged effluent into Lake Champlain pursuant to a discharge permit issued under the Clean Water Act, 33 U.S.C. § 1251, *et. seq.* Plaintiffs, residents of Vermont, filed suit against the paper mill alleging that the discharge constituted a common-law nuisance under Vermont law. A preemption argument was raised based upon the Clean Water Act's prohibition of state regulation

of an out-of-state "source" of discharged effluent. The Supreme Court held that the Clean Water Act preempted the common-law nuisance action. In doing so, the Court noted:

> The affected state's nuisance laws would subject [International Paper] to the threat of legal and equitable penalties . . . . Such **penalties would compel the source** to adopt different control standards and a different compliance schedule from those approved by the EPA . . . .

*Ouellette*, 479 U.S.at 495 (emphasis added). Additionally, the Court held that:

> If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, **at a minimum** [International Paper] **would have to change** its methods of doing business and controlling pollution to avoid the threat of ongoing liability . . . . The inevitable result of such suits would be that Vermont and other states could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.

*Id.* (emphasis added).

Although the Eleventh Circuit Court of Appeals has not specifically considered whether or not FIFRA preempts state common law torts that impose requirements for insecticide labels, the court has in a recent case affirmed the principle that a State regulates by creating common law tort claims just as it does by creating other forms of preventive relief. See Taylor v. General Motors Corp., No. 87-5879 (11th Cir. June 14, 1989). The court held that the National Traffic and Motor Vehicle Safety Act impliedly preempted state tort law. The court came to this conclusion even in the face of a "savings clause" which stated that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* at 2978 (quoting 15 U.S.C. § 1397(c).

The preemption of state tort law by FIFRA is even stronger than the preemption found in Taylor. In this case, Congress has expressly preempted state law. Furthermore, Congress has not provided a savings clause that would revive any common law remedies that regulate insecticide labels.

The Court finds, therefore, that a state court jury verdict would have the effect of "regulating" the content of a warning label. Since FIFRA expressly preempts state law regulation of pesticide labeling, plaintiffs' state law claims fail to the extent that they are based on defendant's failure to warn.

### 5. Approval Of Defendant's Labels By The EPA

Plaintiffs argue that the defendant has not established that the EPA approved its labels and that absent such approval, the preemption defense is not established. Plaintiffs specifically object to the defendant's introduction of the affidavits of individuals who do not have personal knowledge of whether or not the EPA approved defendant's labels.

The Court disagrees with plaintiffs' implicit assumption that the preemption defense requires a showing that the EPA actually approved defendant's labels. At most, such a showing would establish that the defendant violated federal regulations concerning labeling. Such a showing would not negate the fact that Congress has expressly preempted state regulation of labeling through a specific expression to that effect by statute. The Court finds that various affidavits submitted by the defendant to show that the EPA approved its labels are irrelevant to this proceeding and have no bearing on this Court's finding of preemption.

### 6. Necessary And Available Information

The Court disagrees with plaintiffs' argument that preemption requires defendant to show that they have provided to the regulatory agency all the necessary and available information on which to base a warning. A showing that the EPA approved defendant's labels based on inadequate information would not negate a finding that under the law of preemption, the EPA has the exclusive right to regulate those labels. A showing that the EPA based its decision on inadequate information would be appropriate if, for example, the agency approval of defendant's labels were offered for its collateral estoppel effect. This Court's finding of preemption is not based on collateral estoppel or on the agency's approval of the defendant's labels.

The Court's finding of preemption in this case is based on the fact that Congress expressly preempted state law. If Congress has taken away the ability of the states to regulate labels and assigned the regulation of labels to a federal agency, Congress has determined that such an assignment promotes the general welfare. Whether that federal regulatory agency carries out its function based on all available and necessary information is, therefore, irrelevant to a preemption inquiry. This Court cannot second guess the wisdom of that decision. A cause of action based on insufficient labeling would subvert the regulatory scheme for pesticide labeling. Such a cause of action would permit states to regulate labels in the guise of an action for damages and violate Congress's expressed mandate that state's should not regulate labels.

### C. Plaintiffs' Remaining Claims: Defectiveness And Unreasonable Dangerousness Under Non-Warning Theories

In Florida the elements of a cause of action for strict liability in tort are 1) the manufacturer's relationship to the product in question, 2) the defective and unreasonably dangerous condition of the product, and 3) the existence of the proximate causal connection between such condition and the user's injuries or damages. *West v. Caterpillar Tractor Company. Inc.*, 336 So. 2d 80, 87 (Fla. 1976). The elements of a cause of action in a negligence products liability case are 1) the existence of a duty on the part of the defendant to protect the plaintiff from injury or damage of which plaintiff complains, 2) the failure of the defendant to perform that duty, and 3) injury or damage to plaintiff proximately caused by such failure. *Blackton Building Supply Co. v. Garesche*, 383 So. 2d 250, 251 (Fla. 5th DCA 1980). In practice, the causes of action for strict liability in tort and negligence are similar, and both require proof that the defendant's product was defective and unreasonably dangerous. *See Witt v. Norfe. Inc.*, 725 F.2d 1277-79 (11th Cir. 1984).

Florida law recognizes that the defective and unreasonably dangerous condition of a product can be established by showing that a product contained a manufacturing flaw, *see Matter of Standard Jury Instr. (Civil Cases)*, 435 So. 2d 782, 782-83 n.* (*citing* Restatement (Second) of Torts, § 402A, comment k, (1965)), or by showing that a product contained a design defect. *Id.* It appears that Florida

courts have not spoken definitively as to whether or not a manufacturer's failure to warn can constitute a ground for finding a product defective and unreasonably dangerous. *See id.*, 435 So. 2d at 783 n.*.

This Court assumes without deciding that Florida law would recognize that a manufacturer's failure to warn could at least under certain conditions render a product defective and unreasonably dangerous. Although this Court is aware that other jurisdictions have found that a manufacturer's failure to warn can constitute an independent ground for finding a product to be defective and unreasonably dangerous, *see 2 American Law of Products Liability 3d*, Part 5, Chapter 17, § 17:3, n.9 (T.E. Travers ed. 1987), this Court's ruling should not be interpreted as any extension of Florida law on this issue. In light of the Court's conclusion that any cause of action based on the defendant's failure to warn is preempted, the existence of the cause of action in the first instance is immaterial to the Court's decision.

The Court finds that plaintiffs' theory for finding the products defective and unreasonably dangerous is not based exclusively on defendant's failure to warn, but on a theory that products containing Paramite have design defects and/or manufacturing flaws. To the extent that plaintiffs' claims are based on the defective and unreasonably dangerous condition of defendant's products due to defendant's failure to warn, plaintiffs' claims are preempted as a matter of law. To the extent that plaintiffs' claims are otherwise based on the defectiveness or unreasonable dangerousness of defendant's product on theories of defective design or manufacturing flaw, the plaintiffs' claims remain viable.

This Court stresses that this opinion does not address any issue not raised and briefed by the parties. In particular, the parties have not addressed the question whether or not the defendant can assert its warnings as a defense to plaintiffs' remaining claims, or whether or not the assertion of a defense of warning is preempted by FIFRA.

**II. Interlocutory Appeal**

The Court finds that this order and partial judgment, although interlocutory in character, involves a controlling question of law as to which there is substantial ground for difference of opinion and

upon which an immediate appeal from the order may materially advance the ultimate termination of the litigation. In particular, the Court finds that whether or not FIFRA expressly preempts state products liability law is such a question. The Court so certifies pursuant to 28 U.S.C. § 1292(b).

The Court reminds the parties that either or both of them have ten (10) days from the date of this order in which to file an application under 28 U.S.C. S 1292(b) for the Court of Appeals to review this order and partial judgment. If either of the parties file such an application with the court of appeals, this Court shall stay all proceedings in this case pending the disposition of the § 1292 application by court of appeals and any interlocutory appeal which that court may entertain.

### III. **Plaintiffs' Remaining Motions**

As to Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989, the Court finds that the Amended Complaint attached to the motion contains claims based on defendant's failure to warn. The Court also notes that the ultimate contents of the complaint may be affected by a possible interlocutory appeal.

The Court will, therefore, deny the motion to file the amended complaint attached to the motion. The Court will, however, give plaintiffs leave to file an amended complaint subsequent to the court of appeals' decision on any application for interlocutory appeal and subsequent to any interlocutory appeal that the court of appeals may thereupon entertain.

Accordingly, it is

ORDERED and ADJUDGED:

1. That Defendant Zoecon Corporation's Motion For Partial Summary Final Judgment, filed April 10, 1989, is granted.
2. That judgment is hereby entered for defendant Zoecon and against the plaintiffs to the extent plaintiffs' claims are based on the defendant Zoecon's failure to warn.
3. That Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989, is denied.

4. That plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989, is denied.

5. That this Court hereby certifies that this order and partial judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal under 28 U.S.C. § 1292(b) would materially advance the ultimate termination of the litigation.

6. That either or both parties may within ten (10) days from the date of this order file an application under 28 U.S.C. § 1292(b) with the court of appeals to review this order and partial judgment.

7. That if either plaintiff or defendant Zoecon should file a §1292(b) application with the court of appeals, all proceedings in this case shall thereupon be stayed pending the disposition of the § 1292 application and any interlocutory appeal which the court of appeals may thereupon entertain.

8. That if the court of appeals accepts jurisdiction over the interlocutory appeal, the pretrial conference set for December 19, 1989, shall automatically be cancelled until further order of the Court, and the parties shall automatically be relieved from being required to file a pretrial stipulation until further order of the Court.

DONE AND ORDERED at Jacksonville, Florida, this 2nd day of Aug., 1989.

/S/ SUSAN H. BLACK

UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Garry Randolph, Courtroom Deputy Clerk